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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 COMPASS, INC., ET AL.,

4 Plaintiffs,

5 v.

21 CV 02195 (AJN)

Telephone Conference

6 REAL ESTATE BOARD OF NEW YORK,  
7 INC.,

8 Defendant.

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9 New York, N.Y.

June 25, 2021

10 3:21 p.m.

11 Before:

12 HON. ALISON J. NATHAN,

13 District Judge

14 APPEARANCES VIA TELECONFERENCE

15 CROWELL & MORING, LLP  
Attorneys for Plaintiffs

16 BY: CHAHIRA SOLH  
DIANE SHREWSBURY  
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19 BY: CLAUDE G. SZYFER  
20 PATRICK N. PETROCELLI

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(The Court and all parties appearing telephonically)

THE COURT: Good afternoon, everyone. This is Judge Nathan. I'll ask Ms. Williams to please call the case.

(Case called).

MS. SOLH: Good afternoon, your Honor. Chahira Solh from Crowell and Moring for the Compass plaintiff, and I'm joined by my colleagues, Glen McGorty and Diane Shrewsbury.

THE COURT: Good afternoon, Ms. Solh, to you and your colleagues. Thank you very much.

And on behalf of defense?

MR. SZYFER: Sure, your Honor. Good afternoon. Claude Szyfer from Stroock and Stroock and Lavan on behalf of the defendant, Real Estate Board of New York, which I'll refer to as "REBNY" just for short. And I'm joined by my colleague, Patrick Petrocelli.

THE COURT: Good afternoon, Mr. Szyfer and to your colleague as well. Thank you.

And can I confirm we have our court reporter on the line, please?

THE REPORTER: Yes, your Honor. I'm here. Good afternoon.

THE COURT: All right. Good afternoon, Rose. Thank you so much.

All right. We're here for a pretrial conference in the antitrust matter. I did receive the parties' joint letter

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1 and the case management plan. It seems as though the primary  
2 dispute for resolution today is whether to stay discovery  
3 pending briefing resolution of the motion to dismiss.

4 But, Ms. Solh, I'll give you the floor. Tell me what  
5 you think I need to know for purposes of resolving how we  
6 should proceed with discovery at this time, and any other  
7 matters I can address from your perspective.

8 MS. SOLH: Thank you, your Honor. And thank you for  
9 taking the time to meet with us today. As you indicated, in  
10 the case management letter and schedule that we filed, the  
11 parties are in general agreement about the schedule itself.  
12 Really, the main issue is the start of discovery.

13 Compass is ready to proceed with discovery, and we  
14 don't believe a stay is necessary. REBNY, obviously, does  
15 believe a stay is necessary. As you may know, we are in the  
16 middle of the motion to dismiss briefing, and Compass will file  
17 its opposition on July 2nd to the motion to dismiss, and REBNY  
18 will be filing its reply on July 30th.

19 We believe that, under the case law, it's REBNY's  
20 burden to show good cause of why discovery should be stayed,  
21 and we don't believe they have done so. I'm happy to walk  
22 through the factors that the Court should consider, but we  
23 believe that the only issue really is the stay on discovery.

24 THE COURT: Sure. No, I appreciate that. I think the  
25 questions I tend to ask in this posture -- obviously, I don't

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1 have your opposition briefing yet on the motion.

2 I've looked at the motion. It does appear if the  
3 motion is successful, would be fully dispositive; so I tend to  
4 ask that question, and sometimes discovery would be useful,  
5 even if fully dispositive here, because the case might proceed  
6 in state court. You do have state court claims as supplemental  
7 jurisdiction to this matter; so I suppose that has implication  
8 here.

9 Why don't you tell me what discovery generally  
10 consists of, what it will look like, and what harm flows, if  
11 any, from staying discovery until resolution of the motion.

12 MS. SOLH: Thank you, your Honor. And I appreciate  
13 that you haven't yet seen our brief in opposition to the motion  
14 to dismiss, but when you do, I think you'll find that there are  
15 strong arguments as to why we think dismissal is inappropriate.

16 And I don't want to turn this into a motion to dismiss  
17 argument, but we do think that -- we don't believe that REBNY's  
18 motion to dismiss is going to be fully dispositive. And we  
19 think that -- in fact, I don't know that it will really narrow  
20 the claims here.

21 What we'd like to focus discovery on, really, is there  
22 is one particular rule that is at issue in this litigation, and  
23 it's Article II, Section 7 of the Universal Co-brokerage Rules.  
24 And there are really three types of discovery or three requests  
25 that we would like to make.

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1           And in full disclosure, your Honor, we have served our  
2 rule 26 disclosure, initial disclosures, and served the  
3 requests for document production already. And there are three  
4 requests in there that we really think would stand out, and  
5 really be important for us right now, and would allow us to  
6 move forward with the case.

7           And those would be documents and communications  
8 related to the adoption of Article II, Section 7; documents and  
9 communications related to the enforcement of Article II,  
10 Section 7; and documents and communications related to  
11 amendments of Article II, Section 7.

12           And those are really all of -- relate to the claims  
13 that we are making in the complaint. And the prejudice to  
14 Compass really would be that -- you know, REBNY at this point,  
15 if there was a stay in discovery, there are a few different  
16 things that occur. REBNY has decided, at least for some of the  
17 complaints that are on file inside of REBNY related to Article  
18 II, Section 7, but it's going to stay those hearings. But it  
19 could reinstate the hearings on Article II, Section 7  
20 complaints hearing at any time.

21           And even if they don't actually hear those complaints,  
22 at this point, agents' mobility is still hindered and Compass'  
23 ability to recruit agents is still limited with this litigation  
24 pending. And there will be some discovery that I think will  
25 rely on actual, you know, recollections of witnesses and

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1 discussions that have been had. And as we all know, memories  
2 fade over time; so it's important for us to start really  
3 gathering information that could be lost over time.

4 THE COURT: And that concern over stale evidence is  
5 met with those three categories of discovery that you just laid  
6 out, or it goes beyond that?

7 MS. SOLH: I think it would be. Obviously, at some  
8 point, we would like to probably depose some people related to  
9 those but understanding that that would come at a later time.

10 THE COURT: Right. Okay. All right. I understand  
11 your position. Thank you.

12 Let me hear from Mr. -- tell me how to say your name  
13 again?

14 MR. SZYFER: Yes, of course, Judge. It's Szyfer.  
15 It's a lot easier to pronounce than it looks.

16 THE COURT: Szyfer, you're right. Go ahead,  
17 Mr. Szyfer. Thanks.

18 MR. SZYFER: Sure, of course. So, your Honor, while  
19 in the letter and while Ms. Solh has represented to the Court  
20 that they just want discovery relating to just what they claim  
21 are three limited subject matters, they actually served us with  
22 their document requests on Monday and their 15, very broad,  
23 separate document requests, many of which have subparts.

24 I'm happy to read you a couple of them. It's -- some  
25 of them are seven, eight lines long, but even more importantly,

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1 while representing to the Court that they only seek discovery  
2 on just this limited subject matter, they don't. They actually  
3 seek much broader discovery.

4 There's a request for production showing how  
5 widespread the use of the REBNY listing service is. There's a  
6 request for production to show how much revenue we have made.  
7 There's analyses regarding New York law. They've requested all  
8 documents and communications between REBNY and, you know, the  
9 alleged co-conspirators, Douglas Elliman and Corcoran regarding  
10 Compass.

11 And then they've even requested all communications  
12 between REBNY and Corcoran and Elliman regarding exclusive  
13 listings for any brokerage in New York City. And I can  
14 represent to the Court that there are over 500 brokerage firms  
15 that are members of REBNY.

16 So while Ms. Solh has said that, you know, they're  
17 only looking for things relating to Article II, Section 7,  
18 their actual document requests belie that. That's No. 1.

19 No. 2. With respect to the prejudice, I think it's  
20 fair for your Honor to know, issues relating to Article II,  
21 Section 7 have been raised by Compass for actually almost two  
22 years. And they waited almost two years to file this lawsuit.  
23 A brief stay of discovery here, while the motion to dismiss is  
24 pending, is not going to cause Compass any prejudice.

25 And as Ms. Solh represented to the Court, we have

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1 agreed to stay any pending hearings relating to Article II,  
2 Section 7, and we're not going forward with those. And we've  
3 represented to Compass that we're going to do that pending the  
4 litigation. We're not about to just change our minds and go  
5 forward with those. And agent --

6 THE COURT: Pardon me.

7 MR. SZYFER: Yes, your Honor.

8 THE COURT: Do you make that representation to the  
9 Court, that you'll stay Article II --

10 MR. SZYFER: That's right.

11 THE COURT: -- Section 7 proceedings?

12 MR. SZYFER: Yes, your Honor. With respect to Compass  
13 and the complaints against them, we do represent that -- we  
14 will make that representation.

15 And as we've made clear in our motion to dismiss, and  
16 again without getting into the motion to dismiss in a  
17 substantive way, agent mobility is not in any way impaired by  
18 Article II, Section 7. As Compass has admitted in its  
19 complaint, they had approximately 800 agents in 2018, and the  
20 latest numbers is they now have over 2,400. So even while the  
21 most Draconian version of the rule that they claim is in place,  
22 they have more than tripled in size.

23 So, you know, we are very confident that the motion to  
24 dismiss has merit; that it has raised substantial grounds for  
25 dismissal. As the Court identified, you know, if granted, it



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1 would dismiss the entire case.

2 And a short, you know, stay of discovery pending  
3 resolution of the motion to dismiss, and as Ms. Solh said,  
4 we're talking now about a month, in terms of briefing and then,  
5 you know, having the Court resolve it. So it's not like we're  
6 talking about a major delay in terms of a stay of discovery.  
7 We're asking for during the pending motion, and given the fact  
8 that they've waited almost two years to bring this suit, you  
9 know, they haven't suffered in their recruitment during those  
10 two years, and they're not going to suffer now.

11 So, you know, the burden to REBNY to respond to these  
12 15 incredibly overbroad requests will be great. We are a  
13 not-for-profit trade association. We're not a now-public  
14 company, which is Compass, with coffers of, you know,  
15 tremendous resources. We are a not-for-profit, and we live on  
16 our membership dues. And having to pay for discovery while our  
17 motion to dismiss is pending and potentially going to resolve  
18 the entire case would be prejudicial to REBNY, whereas the  
19 prejudice is nonexistent to Compass.

20 THE COURT: Let me ask you, Mr. Szyfer, I understand  
21 the argument as to burden and prejudice with respect to what  
22 sounds like the current pending discovery requests. What about  
23 a much more constrained approach, consistent with what Ms. Solh  
24 said earlier; so as I gather, again, we're talking about docs  
25 and communications related to adoption, enforcement and

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1 amendment of Article II, Section 7?

2 MR. SZYFER: Sure, your Honor. So, first of all,  
3 their document requests asks for documents going back  
4 six-and-a-half years. They've asked for documents from  
5 January 1st, 2015, to the present. So it would require us to  
6 review and try to identify docs going back six-and-a-half  
7 years.

8 And as I mentioned -- so I'll give you an example of a  
9 document request they've included here. It says: "All docs,  
10 including but not limited to: Communications concerning  
11 REBNY's development and adoption of Article II, Section 7 in  
12 approximately 2016 through 2018, including but not limited to  
13 documents from or related to meetings where the adoption of  
14 Article II, Section 7 was discussed; documents related to  
15 members reactions to or complaints about the development and  
16 adoption of Article II, Section 7; communications between  
17 employees regarding the development and adoption of Article II,  
18 Section 7; or communications between REBNY and any third party  
19 regarding the development and adoption of Article II, Section  
20 7."

21 So even just one regarding, you know, the development  
22 and adoption, which is essentially one of their key points, is  
23 quite overbroad and would ask us to be searching for docs, you  
24 know, for an extended period of time relating to a number of  
25 different subject matters involving Article II, Section 7.

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1           So I would submit that even this limited attempt to --  
2 attempt to limit discovery would still be quite broad and quite  
3 burdensome for REBNY.

4           THE COURT: In that example you read, I just wanted to  
5 understand the timeframe because you began by saying --

6           MR. SZYFER: Yes.

7           THE COURT: -- that they -- please, let me finish.

8           MR. SZYFER: Sure.

9           THE COURT: The timeframe, 2013 to present, and then I  
10 think what you read in that example was between 2016 and 2018;  
11 do I have that right?

12          MR. SZYFER: Yeah, that's right, your Honor, and  
13 apologies, I didn't mean to speak over you. But then there are  
14 other actual requests that relate to Article II, Section 7 that  
15 are not limited in time period.

16          For example, request No. 2, which again involves  
17 communications regarding the enforcement of Article II, Section  
18 7, and that's not limited to the 2016 to 2018 time period.

19          And then also request No. 3, which relates to any  
20 revisions to Article II, Section 7, which again is during the  
21 relevant time period which they submit is January 1st, 2015, to  
22 the present.

23          THE COURT: 2015 to the present. Okay. All right.

24          Ms. Solh?

25          MS. SOLH: Thank you, your Honor. So I will respond

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1 in saying that even though we have been in discussions with  
2 REBNY for two years, part of what led to this lawsuit was the  
3 fact that we couldn't reach resolution with REBNY over those  
4 two years.

5 And so, you know, we've been working hard to try to  
6 make sure that Compass continues to be able to compete in the  
7 market in New York. And even though they have grown, they  
8 could have and would have grown more had it not been for the  
9 anticompetitive conduct of REBNY and the co-conspirators.

10 On the point of the burden and the scope of the  
11 discovery requests, you know, I did mention the three requests  
12 because your Honor asked me to tell you what would be  
13 prioritized for us. And, you know, the reason we're going back  
14 in time to 2015 is because the rule was -- the rule started  
15 being contemplated in 2016 and was adopted in 2018. So that's  
16 the scope of the time period.

17 And so both types of documents, obviously, would be  
18 relevant to the adoption and then eventually the amendment of  
19 the rule. So that's why we have the scope of those  
20 documents -- the time period for those documents.

21 You know, REBNY is a big organization that has tons  
22 and tons of other rules and enforcement of other types of real  
23 estate issues and does a lot. And Article II, Section 7 is  
24 really just only one of those rules and one -- the one that  
25 we're focused on.

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1           So while there may be some burden to it, I don't know  
2           that it's going to be as significant because we're not prying  
3           into all of their business if we are limiting it to the three  
4           requests that I've mentioned here. It would help us move  
5           forward and move forward with the litigation itself and make  
6           sure that we have access to the information that's necessary.

7           THE COURT: So just on the timeframe question. Is it  
8           right, then, the timeframe for information about enforcement  
9           and amendment would be post 2018, wouldn't it?

10          MS. SOLH: It would be, yes.

11          THE COURT: So the communications relating to adoption  
12          of the rule would be something like 2016 to 2018?

13          MS. SOLH: They would be, but -- sorry.

14          THE COURT: And then the same for enforcement,  
15          amendment would be 2018 to present?

16          MS. SOLH: Before the adoption, it could -- the reason  
17          we've gone back to 2015 is because there could have been  
18          discussion about the adoption of the rules starting before the  
19          rule actually was adopted. But any revisions or amendments and  
20          the enforcement of it would have been focused around the 2018  
21          period going forward.

22          THE COURT: And I agree with you, I don't want to dive  
23          into the merits either of the motion or the complaint at this  
24          point, but what is the basic relevance of the sort of  
25          pre-adoption communications?

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1 MS. SOLH: So part of our allegations are that the  
2 rule was adopted specifically to target Compass, and it was  
3 done so as part of the conspiracy to adopt this rule, to slow  
4 down Compass' growth, and that included REBNY, with Douglas  
5 Elliman and Corcoran, working together to find a solution to  
6 slow the movement of agents from traditional brokerages, like  
7 Douglas Elliman and Corcoran, to Compass, which was a relative  
8 newcomer.

9 And so the allegations -- or the information related  
10 to the adoption of the rule is going to be important because it  
11 will support the fact that this was -- that the reason this  
12 rule was adopted was for anticompetitive reasons and to harm  
13 Compass.

14 THE COURT: And tell me again the distinction between  
15 a beginning point of 2015 and 2016?

16 MS. SOLH: We have requested documents going back to  
17 2015 because there could have been discussions, you know, prior  
18 to 2016, when we really think in earnest these discussions  
19 began. We're not sure.

20 If there are the communications in 2015, but since  
21 there seem to have been earnest discussions about this in 2016,  
22 we wanted to make sure there wasn't anything earlier, and  
23 that's why we've included the earlier start date. But really,  
24 if the Court wanted to narrow it to starting in 2016, that  
25 would be fine.

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1 THE COURT: So the narrow -- the potential narrowed  
2 proposal on the table, pending resolution of the motion to  
3 dismiss, would be documents and communications related to  
4 adoption, enforcement and amendment of Article II, Section 7  
5 between 2016 and 2018; is that right?

6 MS. SOLH: I think we would need to go for the  
7 enforcement and amendment past 2018 --

8 THE COURT: Right.

9 MS. SOLH: -- to the present just because that's  
10 how -- that's part of the discovery, but yes.

11 THE COURT: Yes, you're right. I misspoke. So with  
12 respect to adoption, 2016 to 2018; enforcement and amendment  
13 would be 2018 to present. That's the proposal?

14 MS. SOLH: That's correct, your Honor.

15 THE COURT: Mr. Szyfer, so with that specific proposal  
16 on the table, just give me a practical sense of what kind of  
17 burden that is. We're talking e-mail searches for key search  
18 terms among certain custodians. What else?

19 MR. SZYFER: Yes, it would certainly be a pretty  
20 significant burden to have to go back that long in terms of  
21 doing e-mail searches, and then also for hard copy documents  
22 and things like that, that it would be a pretty significant  
23 burden to have to go back that far.

24 THE COURT: So really, your argument here, to meet  
25 your burden for stay of discovery, Mr. Szyfer, is that you

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1 think you'll likely prevail on a dispositive motion and that  
2 the interim discovery being sought is, indeed, quite burdensome  
3 to this organization, in light of the time frame and nature of  
4 the request; is that right?

5 MR. SZYFER: That's right, your Honor, and also, the  
6 fact that the prejudice here to Compass, as I mentioned before,  
7 would be quite minimal given, one, the delay in bringing this  
8 action of over two years; two, the fact that they continue to  
9 recruit and don't seem to have a problem recruiting, as their  
10 own complaint demonstrates; and then, three, the fact that  
11 we've represented to the Court that we are not going to be  
12 going forward with any proceedings involving Compass and  
13 Article II, Section 7. And so, therefore, they won't suffer  
14 any prejudice, while the prejudice to REBNY would be much  
15 greater.

16 THE COURT: All right. Ms. Solh, any final points?

17 MS. SOLH: I don't think so. I don't want to repeat  
18 what I've already said; so no, your Honor.

19 THE COURT: I appreciate that.

20 All right. Thank you, counsel. I have considered the  
21 arguments in the letter briefing, and today I am going to grant  
22 the request to stay discovery pending the motion to dismiss.  
23 I'm not prejudging the motion in any way. If it were to  
24 prevail, it would be fully dispositive.

25 Discovery being sought is not insignificant, in light



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1 of the timeframe and given the nature of the organization, as  
2 well as REBNY's agreement to stay any additional Article II,  
3 Section 7 proceedings vis-a-vis Compass in the interim of final  
4 resolution of this dispute.

5 And lastly, given that the motion to dismiss is filed,  
6 opposition is due in short order, it will be fully briefed  
7 within a month. And I wish I could say I'll turn to it as soon  
8 as it comes in. It will go in the queue, but I will certainly  
9 get you resolution as quickly as I can, in light of the Court's  
10 docket.

11 If we do get past the motion to dismiss with any  
12 remaining claims, I do intend to put you on the agreed-upon  
13 discovery schedule. We'll stick to it. So certainly the  
14 defendant should be -- both sides, but the defendant should be  
15 taking measures to ensure that if the case does survive the  
16 motion, that we'll proceed expeditiously on the schedule the  
17 parties propose.

18 Ms. Solh, is there anything else I can address at this  
19 time?

20 MS. SOLH: No. Thank you, your Honor.

21 THE COURT: Mr. Szyfer?

22 MR. SZYFER: No. Thank you, your Honor.

23 And again, apologies about the speaking over you  
24 before. Just, I'm on headphones that weren't all that clear;  
25 so apologies for that.

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1 THE COURT: I appreciate that. It's the nature of  
2 phone proceedings, which have their advantages and their  
3 disadvantages. So no additional apology necessary. Thank you.

4 MR. SZYFER: All right. Thank you.

5 THE COURT: All right. Counsel, we are adjourned.

6 MS. SOLH: Thank you.

7 MR. SZYFER: Thank you.

8 (Adjourned)